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Referral of Lien Actions to Small Claims Court

Lien actions cannot be commenced in Small Claims Court. Section 50(1) of the *Construction Act* (“Act”) specifies that a lien claim is only enforceable in an action in the Superior Court of Justice. However, litigating a lien action in the Superior Court of Justice can be costly, particularly if the amount of the claim is below the \$35,000.00 threshold for Small Claims Court. Referral to the Small Claims Court is a cost saving technique, taking into consideration that parties will avoid the costs associated with examinations for discovery, full production, pre-trial conference hearings and potentially trial.

Section 58(1)(c) of the Act provides that if the action is for an amount that is within the monetary jurisdiction of the Small Claims Court a judge may refer the whole action or any part of it for trial to a deputy judge of that Court or to the Small Claims Court Administrative Judge.

While the Act permits such referrals, the steps in the referral process are not very clear. There are no guidelines or Practice Directions that outline how the referral process between the Superior Court of Justice and the Small Claims Court takes place.

Outlined below is a step-by-step guide to refer lien actions to the Small Claims Court:

1. Once pleadings are closed, bring a motion before a judge for a judgment of reference in the Superior Court of Justice where the action was commenced. A precedent can be found at the following link: <http://ontariocourtforms.on.ca/static/media/uploads/courtforms/cla/23/form23-rev0421-fil-en.doc>. It is highly recommended to discuss the referral with opposing parties and bring the motion on consent, which will make the process much smoother. Parties must take into consideration whether there are any counterclaims and the monetary amount of the counterclaims.
2. Once the Judgment is issued and entered, prepare a requisition to the local registrar of the Superior Court of Justice requesting that the Superior Court of Justice file be referred to a Deputy Judge for trial. The wording should be simple, such as “**I REQUIRE**, in accordance with the Judgment of the Honourable Justice [insert name], dated January 1, 2022, a copy of which is attached, that the within action be referred to a Small Claims Court Deputy Judge for trial”. It is very important to attach a copy of the Judgement of Reference to the requisition.
3. Attend at the Superior Court of Justice to submit the requisition along with the transmission of documents fee in the amount of \$99.00 payable to the Minister of Finance. Unfortunately, the civil Claims Portal does not currently have an option for this disbursement. As a result, the moving party

will have to submit the requisition along with the fee either in person or by sending the requisition and the fee by mail.

4. Once the requisition is submitted and the transmission of documents fee is paid, the Superior Court of Justice will transfer the file to the Small Claims Court and a new temporary Small Claims Court file number will be assigned.
5. The matter will be placed in queue for a settlement conference and a Notice of Settlement Conference will be sent to the parties by the Small Claims Court.
6. If the action is not settled at the Settlement Conference, the matter will be set down for trial before a Small Claims Court Deputy Judge.
7. Upon conclusion of the trial, the Small Claims Court Deputy Judge will issue a report. The file will then be transferred back to the Superior Court of Justice for confirmation of the report, following which the parties will be able to pursue the final steps in the action, such as payment, discharge of the lien or dismissal of the action.

It is important to note that while the referral to the Small Claims Court is intended to make the lien action process less costly, parties should take into consideration that the referral process itself could be a lengthy and expensive exercise, particularly if the Judgment of Reference is contested or if there are counterclaims that exceed the monetary jurisdiction of the Small Claims Court.



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